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No. 05-1074

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IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,
Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

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BRIEF FOR THE PETITIONER

Petitioner Lilly M. Ledbetter respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-37a) is published at 421 F.3d 1169. The district court's order and memorandum opinion on post-trial motions (Pet. App. 38a-42a) are unpublished. The district court's order on the objections to the magistrate judge's report and recommendation on respondent's motion for summary judgment (Pet. App. 43a-45a), and the report and recommendation itself (Pet. App. 46a-82a), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2005. The court of appeals denied rehearing and rehearing en banc on October 26, 2005. Pet. App. 83a. Justice Kennedy extended the time to file the petition for certiorari until February 17, 2006. App. No. 05A633. This Court granted certiorari on June 26, 2006. The Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. 2000e-5(e)(1) provides, in relevant part:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * ."

STATEMENT

A jury found that at the time petitioner Lilly Ledbetter filed her charge of discrimination with the Equal Employment Opportunity Commission (EEOC), respondent Goodyear Tire and Rubber Company was paying petitioner less than her male counterparts because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The district court agreed that this finding of fact was amply supported by the evidence at trial. The court of appeals nonetheless reversed the verdict because it concluded that petitioner was precluded from complaining about any present disparity in her pay that was the result of discriminatory decisions made more than 180 days before petitioner filed her EEOC charge (or, perhaps, the court held out, the most recent pay decision before the limitations period). Because the court believed that respondent's most recent pay decisions were nondiscriminatory, it held that Goodyear could not be held liable for continuing to pay petitioner less that her male colleagues for equal work even if the jury properly concluded that this disparity was the result of intentional sex discrimination.

1. Title VII prohibits discrimination "against any individual with respect to his compensation * * * because of such individual's race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(a)(1). Under Section 706(e) of the Act, an individual must file a charge of discrimination with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1).[1] If the EEOC dismisses the charge, or fails to file suit on behalf of the employee within certain time limits, the Commission "shall so notify the person aggrieved and within

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[1] If the employee files a charge of discrimination with a state agency with appropriate jurisdiction, the employee is allowed 300 days to file her charge with the EEOC. In all other circumstances, the time limit is 180 days. *Ibid.*

ninety days after the giving of such notice," the employee may bring a private civil action against the employer. *Id.* § 2000e-5(f)(1).

The charge-filing deadline of Section 706(e)(1) operates like a statute of limitations, precluding suit on any time-barred claim. *National Railroad Passenger Corporation* v. *Morgan*, 536 U.S. 101, 110 (2002) The time limit begins to run when the unlawful employment practice occurs. *Id.* at 111. When the unlawful employment practice is a "discrete" event – like a termination – the employee must file a charge within 180 or 300 days of that event. *Id.* at 114. If the employer engages in a series of recurring discrete violations, each violation gives rise to an independent claim and the limitations period begins anew with each recurring violation. *Ibid.* In *Bazemore* v. *Friday*, 478 U.S. 385, 395 (1986) (per curiam), this Court held that in the case of disparate pay claims, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII * * *."

2. Because this case comes to the Court on review of a motion for judgment as a matter of law following a jury verdict, the facts must be construed as a reasonable jury could have found them, taking the evidence in the light most favorable to the plaintiff. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

Petitioner was hired as a Production Supervisor at Goodyear Tire and Rubber's plant in Gadsden, Alabama, on February 5, 1979. Pet. App. 5a. At the time she was hired, petitioner had fifteen years of prior experience as a supervisor and sixty hours of credit toward her college degree. J.A. 33-34, 50. In 1985, petitioner qualified for the additional duties of the newly created position of "Area Manager," scoring second highest among the more than forty-five applicants. J.A. 34-36, 110. With the exception of brief periods during two general layoffs, petitioner worked as an Area Manager at the plant until January 1998, when she was transferred to a

position as a "Technology Engineer," performing manual labor on the production floor. Pet. App. 5a, 8a; J.A. 48-49. In November 1998, petitioner accepted an offer of early retirement. Pet. App. 9a.

On March 25, 1998, petitioner filed a charge of discrimination with the EEOC.[2] In addition to challenging the transfer, petitioner alleged that she was paid substantially less than her male counterparts for the same work because of her sex.[3] After receiving a right-to-sue letter, petitioner filed suit in the Northern District of Alabama.

a. At trial, petitioner presented pay records and testimony demonstrating that in 1997, she was the only woman working as an Area Manager and was paid less than men in the same position. Pet. App. 8a. Indeed, petitioner's salary was less than the *lowest paid* male in the same job and department, *ibid.*, and substantially less than men with equal or less seniority. J.A. 37-39, 69, 82, 93-95. The pay discrepancy between petitioner and her male counterparts ranged from fifteen to forty percent. Pet. App. 8a. Petitioner's pay was, in fact, so low that it sometimes fell below the minimum salary set by Goodyear's pay policy for her position. J.A. 95-96.

Goodyear did not contest at trial that petitioner was paid substantially less than men doing the same work at the

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[2] Petitioner initially made her allegations through an EEOC questionnaire, followed by a more formal document in July 1998. The parties and the court of appeals assumed for purposes of this appeal that the questionnaire constituted the relevant EEOC charge and that allegations in the formal charge related back to the original filing. Pet. App. 15a. Thus, the Court accepted that petitioner was entitled to challenge any discrimination occurring within 180 days of that date (*i.e.*, conduct after September 26, 1997). *Ibid.*

[3] She further brought claims under the Equal Pay Act (EPA), 29 U.S.C. 206(d), and the Age Discrimination In Employment Act (ADEA), 29 U.S.C. 621-34. Pet. App. 10a n.7. Those claims were resolved prior to trial and are not at issue here. *Ibid.*

factory. Instead, Goodyear asserted that petitioner was paid less as a result of the company's purportedly neutral merit system. Under that system, instituted in the early 1980s, employees received the same pay as the previous year, unless they were awarded a pay raise. See Pet. App. 4a-5a. The Business Center Manager made a recommendation about who should receive a raise and how much, purportedly in light of annual performance rankings based on certain production data, his subjective impressions of the employee's work, and reports by Performance Auditors. Pet. App. 4a; J.A. 78-82.

Under this system, petitioner was consistently given smaller raises than male Area Managers, or no raise at all. Pet. App. 5a-10a. Faced with the evidence of these disparities, Goodyear's witnesses testified that the difference in pay was due principally to petitioner's poor performance as reflected in what they described as her consistently low performance ranking. *Ibid.*

Petitioner challenged this explanation on three fronts.

First, petitioner presented evidence that Goodyear's description of the basis for her pay decisions was false. Petitioner testified that her performance rankings did not accurately reflect the true quality of her work, an assessment shared by another Area Manager who testified at trial and contemporaneous notes from her supervisors. See, *e.g.*, J.A. 43-46, 47, 60-62, 112-113. In fact, petitioner received a "Top Performance Award" in 1996, an award that Goodyear reserved for "individuals who have demonstrated, through value, added contributions that they are, in fact, the top performers in the company." J.A. 90.

Petitioner further testified that her evaluations were falsified. She explained that earlier in her career, her direct supervisor, Mike Maudsley, had threatened to give her poor evaluations if she did not succumb to his sexual advances. J.A. 39-40. Although petitioner was removed from Maudsley's supervision at the time, Maudsley was later assigned to evaluate petitioner's work once again, this time in

the role of Performance Auditor. Petitioner testified that in that role, Maudsley falsified her performance audits. J.A. 44-46. When she confronted him about the poor evaluations, he told her that it was "a lot easier to downgrade you. * * * You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me." J.A. 46. Petitioner further testified that Maudsley "continued to ask me out, go out with him. And I finally told him no. And then from that standpoint, my evaluations, the audits got worse." *Ibid.* Maudsley's audits were a principal basis for petitioner's performance evaluation in 1997, which led to the most recent raise denial. J.A. 77-82. However, even though Goodyear was required by law to preserve the audits pending the outcome of this litigation, see 29 C.F.R. 1602.14, the records were not preserved for the jury's inspection, J.A. 70-73.[4]

In addition, another of petitioner's former supervisors, Mike Tucker, testified that he did not in fact make his pay recommendations in accordance with Goodyear's purported policy. In attempting to explain the discrepancy between his assertion that petitioner was a consistently poor performer and his recommendation that she receive a "Top Performance Award" in 1996, Tucker asserted that he had violated company policy in giving her the award and that her performance that year was in fact substandard. He further denied having told petitioner that she earned the award because of her job performance, but later admitted that he had testified to the contrary in his deposition. J.A. 90-93.

Tucker further testified that Goodyear had not followed its pay policies setting minimum pay levels for petitioner's

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[4] The trial court accordingly instructed the jury that if it found that Goodyear violated Title VII's recordkeeping requirements, it could infer that "if the personnel records had been preserved they would have been beneficial to the plaintiff and not helpful to the defendant." J.A. 99.

position and that, in fact, petitioner's pay fell below that threshold for at least a year. J.A. 97-98.

Second, petitioner presented evidence of widespread discrimination against female managers at the Gadsden plant. Petitioner could recall only two other women who worked as Area Managers during her time at the plant, out of approximately eighty different people who held the position during her tenure. J.A. 36-37.[5] Two such female managers testified at trial, and each told the jury that she had been subject to discrimination at the plant and paid less than her male counterparts. Cathy Robertson was an Area Manager between 1993 and 1998. J.A. 51, 52-54. She testified that although she performed as well as the male managers, she was given low ratings because supervisors at the plant "didn't think [women] could do the job that the men could do." J.A. 55. She also testified that like petitioner, she was paid far less than her male colleagues, even those with less experience, and was also paid less than the minimum required by Goodyear's written policy for a time. J.A. 54-61. She concluded, based on her experiences, that the difference in pay was the result of her "[j]ust being a female in a man's world." J.A. 60.

Retha Burns worked as an Area Manager at the plant for eight years before transferring to a secretarial position because she had lost her childcare provider. J.A. 63, 65. Later, she testified, she was asked to return to the Area Manager position. However, Goodyear continued to pay her secretarial wages, leaving Burns with a lower salary than the men she was supervising. J.A. 65-66. At first, Burns's manager told her it was simply a matter of time until her salary would be raised "up to what the men were making." J.A. 66. After three-and-a-half months, however, Burns's

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[5] A third female manager, Retha Burns, testified at trial and one of petitioner's former supervisors, Jerry Jones, was able to name two others hired during his twenty-five years at the plant. J.A. 63, 83-86.

supervisor informed her that the best he could do was to offer her was a twenty percent raise from her secretarial salary, or $2,600 per month compared to the base salary of $3,600 per month established by Goodyear's policy for the position. J.A. 67-68. Burns refused to do the work of a Manager on a secretary's salary and accordingly transferred back to her secretarial position.

Third, the jury also heard direct evidence of discriminatory animus by plant officials towards petitioner herself. Petitioner testified that toward the end of her career, the Plant Manager told her that the "plant did not need women, that we didn't help it, we caused problems." J.A. 36.

Petitioner received similar comments from Jerry Jones, who worked in the personnel office at the time petitioner was harassed by Mike Maudsley, and who later became her direct supervisor from 1996 until October 1998. Pet. App. 7a-8a; J.A. 41-42. Petitioner testified that when she went to Jones seeking help to end the harassment by Maudsley and another employee, Jones "told me I was a troublemaker" and "said that these men had good careers at Goodyear and they were not going to dismiss them; and that Goodyear really didn't need troublemakers like me." J.A. 41-42. See also J.A. 50-51. In a later meeting, petitioner recalled, Jones said "that they would get rid of me." J.A. 42.

b. After the close of evidence, Goodyear moved for judgment as matter of law. J.A. 98. Goodyear asserted that an employee alleging disparate pay must file an EEOC charge within 180 days of the pay raise decision giving rise to the disparity. Under that theory, petitioner could prevail only by proving that her 1997 pay raise denial was discriminatory. And, Goodyear argued, petitioner failed to present sufficient evidence to sustain that claim. The district court denied the motion, J.A. 98, and, instead, instructed the jury that petitioner was required to "prove that each claim arose within six months of her filing a charge of discrimination with the EEOC." J.A. 99.

After deliberations, the jury returned a verdict in petitioner's favor on her discriminatory pay claims, finding it "more likely than not" that she had been paid "an unequal salary because of her sex." J.A. 102.[6] The jury awarded $223,776 in backpay, $4,662 for mental anguish, and $3,285,979 in punitive damages. Pet. App. 11a. The district court subsequently denied Goodyear's renewed motion for judgment as a matter of law but granted its motion for remittitur of backpay and punitive damages awards. Pet. App. 40a-42a. The court reduced the backpay award to $60,000, reflecting the discrepancy in pay between petitioner and a comparator from March 25, 1996 (two years before the filing of the EEOC charge) to November 1, 1998 (the date of petitioner's retirement). See Pet. App. 41a-42a.[7] The court further reduced the punitive damages award to $295,338 to bring the total award of punitive and compensatory damages within the limits imposed by 42 U.S.C. 1981a(b)(3)(D). Pet. App. 42a.

3. Goodyear appealed, arguing again that petitioner's claims were untimely to the extent they challenged pay disparities arising from decisions made outside the limitations period. The Eleventh Circuit reversed.

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[6] The jury ruled in Goodyear's favor on the transfer-related claims. Pet. App. 10a & n.7.

[7] The petition erroneously stated that petitioner sought only backpay for the period beginning 180 days before she filed her EEOC charge. Pet. 3. In fact, while the jury was instructed that damages could only be imposed for the period "beginning six months from the day that she filed her EEOC questionnaire," J.A. 100, in response to Goodyear's motion for remittitur, petitioner argued, and the district court agreed, that the backpay award was governed by Section 706(g)(1), which provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. 2000e-5(g)(1).

The court recognized that under this Court's decision in *Morgan*, "each discrete discriminatory act starts a new clock for filing charges alleging that act." Pet. App. 16a (quoting *Morgan*, 536 U.S. at 113). The court further concluded that disparate pay cases, unlike hostile work environment claims, involve just such "discrete acts." *Id.* 18a.

The court then observed that it was "undisputed that Ledbetter's claim is not entirely time barred" because "an affirmative decision directly affecting Ledbetter's pay was made within the limitations period * * * ." Pet. App. 19a. Whether petitioner should be allowed to challenge any disparity in her pay that arose from earlier decisions, the court concluded, was a harder question. *Id.* 20a. The court acknowledged that the vast majority of circuits – including "at least the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits," *id.* 20a n.17 – had long relied on this Court's decision in *Bazemore* in holding that "a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful." Pet. App. 20a. Although *Morgan* itself relied on *Bazemore*, see 536 U.S. at 111-12, the Eleventh Circuit nonetheless questioned whether the decisions following *Bazemore* "survive *Morgan*." Pet. App. 22a. But the court ultimately decided that the question was beside the point. Those cases, it concluded, "do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim." *Id.* 22a-23a. The court recognized that "the necessary implication of these cases is that a plaintiff whose claim is preserved by the continued issuance of improperly low paychecks can look some distance back in time for the underlying, intentionally discriminatory decision." *Id.* 23a. "There must, however, be some limit on how far back the plaintiff can reach." *Ibid.*

Finding no such limitation in the text of Title VII, or in the decisions of this or any other court, the Eleventh Circuit proceeded to write its own: "at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a.

Applying its new rule, the court of appeals examined petitioner's last two pay raise decisions to determine "whether Ledbetter presented sufficient evidence for a reasonable jury to conclude that either of these decisions violated Title VII." Pet. App. 28a. The court began by concluding that there was "no evidence produced at trial" to show that the denial of a pay raise in 1998 was discriminatory. Pet. App. 31a. The court acknowledged that the pay recommendation was made by a new supervisor, Kelly Owen, who had no direct knowledge of petitioner's performance and therefore had to rely on the performance audits produced by Mike Maudsley, the supervisor who had previously sexually harassed petitioner and who had admitted to falsifying petitioner's audits. Pet. App. 31a & n.21. The court ignored the fact that Goodyear had illegally failed to preserve the audit reports, see J.A. 70-76, and held that Owen's reliance on the missing audits – which of course the jury was unable to see – was an absolute defense to liability, explaining that it "is not discriminatory to honestly rely on inaccurate information." Pet. App. 31a-32a n.21.

The court next found that the evidence conclusively demonstrated that the reason petitioner was denied a raise in 1997 was because she was scheduled to be laid off due to a reduction in force. Pet. App. 32a The court acknowledged that the principal evidence supporting this explanation was the testimony of Jerry Jones, *ibid.*, the supervisor who previously told petitioner she "was a troublemaker" and that Goodyear "would get rid of [her]." J.A 42. The court also

recognized that petitioner was never actually laid off, and that the day after Jones told petitioner she was going to be laid off, he returned to tell her that she would continue working after all. Pet. App. 7a. The court nonetheless held that the jury was required to believe Jones's testimony that the asserted impending layoff was the real reason she was denied a raise that year. *Id.* 32a. The court also rejected petitioner's claim that the jury could have concluded that even if she were actually slated for layoff, it was because of her sex. *Id.* 33a-37a.

Having decided that the jury could not have found petitioner's most recent pay raise decisions discriminatory, the court of appeals looked no further. "Because she failed to carry her burden of coming forward with sufficient evidence to permit a reasonable jury to find that either of those decisions was a pretext for sexual discrimination, the district court should have granted Goodyear judgment as a matter of law." Pet. App. 37a.

4. The EEOC filed an *amicus* brief supporting petitioner's petition for rehearing en banc, arguing that "the principles enunciated by the Supreme Court in *Bazemore* are still applicable after *Morgan*," and that, "[u]nder these principles, each paycheck Ledbetter received that was lower than it otherwise would have been because of her sex is a 'wrong actionable under Title VII,' even if the sex-based disparity was caused by decision made years earlier." Br. 9. The petition for rehearing was nevertheless denied on October 26, 2005. Pet. App. 83a.

5. This court granted certiorari on June 26, 2006.

SUMMARY OF THE ARGUMENT

In *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), this Court held that recurring violations of Title VII are separately actionable and that a new limitations period arises for each repetition of an unlawful employment practice. In illustrating this principle, the Court gave the example of a disparate pay case, pointing to the Court's prior decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986). That case held that an employer commits a discrete violation of Title VII each and every time it pays similarly situated employees differently for a discriminatory reason prohibited by the statute. *Bazemore* further held that the violation recurred with each disparate paycheck even if the disparity arose out of discriminatory pay decisions made years earlier, even before the effective date of the Act.

Together, *Morgan* and *Bazemore* establish the timely filing requirements for disparate pay claims under Title VII: each paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period. This is the established view of the vast majority of courts of appeals and of the EEOC, whose reasonable and well-supported interpretation of Title VII's limitations provision is entitled to deference. This interpretation is consistent with the approach across a wide variety of statutory and common-law claims: recurring payments give rise to recurring causes of action under the Equal Pay Act, the Fair Labor Standards Act, the common law of contracts, and in a range of other analogous contexts. Finally, the *Morgan/Bazemore* rule is consistent with this Court's anti-discrimination precedent more generally: the Court has long proceeded on the basis that an intentionally discriminatory decision gives rise to new violations of civil rights statutes or the federal Constitution each time it is implemented to cause a new injury. Having enacted and

amended Title VII's limitations provision against this legal background, Congress is presumed to have intended that the principle applied in *Bazemore* would continue to be applied in disparate pay cases unless and until Congress provides otherwise.

The Eleventh Circuit's contrary rule is entirely at odds with the most basic purposes of Title VII. Under the court of appeals' rule, an employee is condemned to perpetually unequal pay for equal work unless she recognizes and complains about the discrimination within a few short months after it first begins. Such forfeitures are likely to be frequent. Unlike other adverse employment actions, discrimination in pay generally occurs in small increments and in a context where grounds for suspicion develop only over time. Workers rarely know in detail how much their colleagues are paid, much less the basis for any disparities they may discover. Even when such information is available, small initial discrepancies may not be worth fighting over, particularly for new employees or those – like petitioner – trying to fit in a non-traditional environment. It is often only when the discrimination manifests in other ways, or when the disparity is magnified (*e.g.*, through future raises calculated as a percentage of current salary), that an employee is likely to complain. A worker's desire to give her employer an initial benefit of the doubt should not preclude her from later challenging the continued payment of an intentionally discriminatory wage.

This does not mean that victims of discrimination may delay bringing charges of pay discrimination indefinitely. *Morgan* established that employers are protected against undue prejudicial delay by the doctrine of laches. And even when that doctrine is inapplicable, delay may preclude a plaintiff from bearing her burden of establishing that the present disparity in pay is the result of intentional discrimination. Moreover, employers are protected against large backpay awards by statutory limits on available remedies.

The court of appeals' unprecedented departure from the rule this Court established in *Bazemore* and reaffirmed in *Morgan* upsets that carefully balanced accommodation of congressional interests. That balance should be restored and the judgment below reversed.

ARGUMENT

As this case comes to the Court, there is no dispute that Goodyear paid petitioner substantially less money for equal work simply because she was a woman. It is further undisputed that she received this discriminatory pay within 180 days of filing her charge of discrimination with the EEOC. The question here is whether such discrimination is immune from challenge, and may be continued in perpetuity, unless the employee can prove that the disparity arose from a discriminatory pay-setting decision made within (or immediately prior to) Title VII's statutory limitations period. This Court has already answered that question. For more than two decades, the Court has held that each discriminatory paycheck constitutes a separate violation of Title VII, giving rise to its own limitations period. While delay in challenging discriminatory pay may disadvantage an employee – making her burden of proving intentional discrimination more difficult, potentially precluding a full recovery of backpay for paychecks issued before the limitations period, or possibly leading to a successful invocation of a laches defense – the delay does not forfeit the worker's right to the most basic guarantees of equal employment opportunities under Title VII.

I. Discriminatory Pay Raise Decisions Give Rise To Recurring Violations Of Title VII As The Decisions Are Implemented Through Periodic Paychecks.

Section 706(e)(1) of Title VII provides that a "charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred.'" 42 U.S.C. 2000e-5(e)(1). In *National Railroad*

Passenger Corp. v. *Morgan*, 536 U.S. 101 (2002), this Court held that recurring violations of Title VII give rise to recurring claims and a new limitations periods under Section 706(e)(1) with every repetition of the violation. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), this Court held that in a disparate pay case, each discriminatory paycheck constitutes an independent unlawful employment practice in violation of Title VII, even if it simply implements a discriminatory pay decision made outside the limitations period. Together, these cases resolve the question presented here and require reversal of the Eleventh Circuit's decision in this case.

A. Under *National Railroad Passenger Corp.* v. *Morgan*, A Title VII Plaintiff May Challenge Any Discrete Unlawful Employment Practice Occurring During The Limitations Period.

In *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), this Court considered how Section 706(e)(1) applies to recurring or related violations of the Title VII. The Court rejected a version of the "continuing violations doctrine" under which "so long as one act falls within the charge filing period, discriminatory or retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." *Id.* at 114. Instead, the Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113.[8] Rather, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *Ibid.* At the same time, the Court also rejected the view that an employee must challenge the first instance of a recurring violation or forfeit the right to

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[8] The Court ruled that "[h]ostile environment claims are different in kind from discrete acts," and accordingly are subject to different rules. 536 U.S. at 115.

challenge its repetition in the future. "The existence of past acts and the employee's prior knowledge of their occurrence," the Court held, "does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Ibid.*.

Accordingly, recurring violations[9] of Title VII give rise to recurring claims, each with its own limitations period. A plaintiff may challenge the discrete violations occurring within 180 or 300 days of her EEOC charge, even if she had not previously (and could not now) complain of violations occurring outside the limitations period.

The Court in *Morgan* acknowledged that, applied inflexibly, such time requirements could sometimes lead to unfair results. But that risk, the Court explained, was mitigated by the availability of equitable doctrines designed to protect the legitimate interests of employees and employers alike. Thus, workers are protected by "equitable doctrines such as tolling or estoppel." 536 U.S. at 113. "Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly." *Ibid.* At the same time, *Morgan* did "not leave employers defenseless against employees who bring * * * claims that extend over long periods of time." 536 U.S. at 121. "Employers have recourse when a plaintiff unreasonably delays filing a charge," and may, for example, "raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." *Ibid.*

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[9] The phrase "continuing violation" is used variously in the lower courts, sometimes to refer to the theory rejected in *Morgan*, and sometimes to refer to the theory of recurring violations *Morgan* embraced. To avoid confusion, this brief uses the term "recurring violation" to refer to a series of repeated discrete acts, each of which gives rise to a new claim with its own limitations period.

B. Under *Bazemore* v. *Friday*, Each Disparate Paycheck Constitutes A Separate Violation Of Title VII.

Under *Morgan*, the "critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" See 536 U.S. at 110. If the unlawful employment practice in a disparate pay case is the pay-setting *decision* (and only that decision), then the violation occurs at the time of that decision and the limitations period runs from that date. Under that view, petitioner may prevail only by showing that Goodyear's pay raise decision in 1998 was illegal. If, on the other hand, the unlawful employment practice is the actual *payment* of the disparate wage because of sex (or if the disparate pay constitutes an additional violation), then each discriminatory paycheck constitutes a new discrete unlawful employment practice with its own limitations period. And under this view, petitioner was entitled to challenge each of the disparate paychecks she received within 180 days of her EEOC charge.

This Court chose between those competing conceptions of disparate pay violations in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), adopting the latter view and treating each paycheck as a discrete, actionable event.

1. The plaintiffs in *Bazemore* brought suit to challenge pay disparities between black and white employees in the North Carolina Agricultural Extension Service. Prior to 1965, the Extension Service was segregated into a white and a "Negro branch." 478 U.S. at 390. While salaries varied widely among different employees and different county offices, it was undisputed that under this segregated system, the Extension Service "paid black employees less than white employees." *Id.* at 394. The branches were integrated on August 1, 1965, but this "did not result immediately in the elimination of some disparities which had existed between the salaries of white personnel and black personnel." *Id.* at 391 (citation omitted). Instead, the prior discriminatory salaries

were continued, subject to periodic adjustments through marginal pay raises that were based on a number of assertedly non-discriminatory factors, including a system of annual performance reviews. See *id.* at 397 & n7; see also *Bazemore* v. *Friday*, 751 F.2d 662, 666-67 (CA4 1984) (describing how merit raises were based on a "quartile system" under which "each employee is placed in one of four quartile groups annually by the District Extension Chairman" based "upon an evaluation of the employee, using the Performance Review Guide"). As a result, the pay disparities "continued after Title VII became applicable to the Extension Service in March 1972." 478 U.S. at 394.

The court of appeals in *Bazemore* held that the plaintiffs could prove a violation of Title VII only if they could establish that the present disparity in their pay arose solely from pay decisions made after the effective date of the 1972 amendments. 751 F.2d at 670. The court concluded that any continuing disparity that was the result of pay decisions pre-dating the Amendments was simply a continuing *effect* of the prior unchallengeable decisions, not a present recurring *violation*. *Ibid.*

In making that distinction, the Fourth Circuit relied on this Court's decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). The plaintiff in *Evans* was an airline employee who had been unlawfully terminated when she became pregnant, but failed to file an EEOC charge until years later, when she was rehired but not given seniority credit for her prior years of service. *Id.* at 555-56. This Court held that her challenge to the seniority decision failed because similarly situated men and women were treated the same (no one with an interruption in service was given credit for prior work for the airline). *Id.* at 558-59. The Court further held that the plaintiff could not rescue her timely but meritless claim by asserting that the denial of seniority credit was the indirect result of the prior discriminatory termination. "A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which

occurred before the statute was passed." *Id.* at 558. It was not enough, the Court held, that the "seniority system gives present effect to a past act of discrimination." *Ibid.* The "critical question is whether any present *violation* exists." *Ibid.* (emphasis in original). See also *Delaware State College* v. *Ricks*, 449 U.S. 250, 257 (1980) (same).

The Fourth Circuit in *Bazemore* read *Evans* to establish that the defendants had no obligation to eliminate current disparities in pay that were the result of "pre-Act discriminatory differences in salaries." 751 F.2d at 670. Accordingly, the court held, the plaintiffs could recover only if they could prove that the present disparities in their pay were the result of post-enactment discriminatory pay raise decisions. *Ibid.* This Court disagreed:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. * * * [T]o the extent an employer continued to engage in that act or practice, it is liable under that statute. * * * Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory differences in salaries did not have to be eliminated.

478 U.S. at 395-96 (emphasis in original).

The Court then explained why the Fourth Circuit's reliance on *Evans* was misplaced:

> Because the employer was not engaged in discriminatory practices at the time the respondent in

> *Evans* brought suit, there simply was no violation of Title VII. * * * *
>
> Here, however, petitioners are alleging that in continuing to pay blacks less than similarly situated whites, respondents have *not* from the date of the Act forward 'made all [their] employment decisions in a wholly nondiscriminatory way.' Our holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* * * * focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure.

Id. at 396 n.6 (citations omitted).

2. *Bazemore* thus answers the twin questions of *Morgan* and, in the process, resolves the question presented by this case.

First, *Bazemore* defines the "unlawful employment practice" in a disparate pay case as the payment of unequal wages to similarly situated workers because of the plaintiff's race or sex. That act is unlawful even if the disparity arises from decisions made outside the limitations period, or even before the effective date of the Act, because the perpetuation of a prior intentional pay disparity is, in itself, a violation of Title VII. 478 U.S. at 395. Put another way, employers have a continuing obligation to eliminate pay disparities arising from intentionally discriminatory pay decisions. *Id.* at 396. Each paycheck issued in violation of that obligation constitutes a new unlawful employment practice. This is true even if some portion of the pay differential is the result of non-discriminatory pay raise decisions, as was alleged in *Bazemore*. The employer still has the obligation to eliminate the portion of the disparity that *is* the result of unlawful discrimination. *Id.* at 394-95.

Second, under *Bazemore*, the "unlawful employment practice" occurs with the delivery of each intentionally disparate paycheck, giving rise to recurring violations each

pay period during which the disparity is perpetuated. *Id.* at 395-96. Indeed, this Court in *Morgan* specifically cited *Bazemore* as a quintessential example of a case involving recurring discrete violations of Title VII, each of which gives rise to its own limitations period. See 536 U.S. at 111-12.

Accordingly, in this case, petitioner was entitled to challenge the discriminatory pay she received beginning 180 days prior to the filing of her EEOC charge. Moreover, the jury was entitled to find the pay disparity during this period unlawful so long as any portion of the disparity arose from an intentionally discriminatory pay decision, even if the two most recent pay raise decisions simply perpetuated, rather than compounded, prior intentional pay disparities. See 478 U.S. at 394-95. Just as the Fourth Circuit erred in *Bazemore* in restricting the search for discriminatory intent to the post-Act pay raise decisions, so too the Eleventh Circuit erred in this case in limiting its review of the sufficiency of the evidence to the pay raise decisions occurring during (or just prior to) the limitations period.

II. The Rule Of *Morgan* And *Bazemore* Comports With The Language And Purposes Of Title VII.

The traditional rule of *Morgan* and *Bazemore* faithfully implements the requirements of Title VII's timely filing requirement while at the same time striking a reasonable balance between the interests of employers and the principal purposes of Title VII's anti-discrimination mandate.

The Court's decision in *Bazemore* followed from the plain text of Title VII itself, which prohibits "discriminat[ion] against any individual with respect to his compensation." 42 U.S.C. 2000e-2(a)(1). The most natural reading of this language is that Congress intended to prohibit the actual payment of disparate wages on the basis of sex or race, not simply the decision to pay a disparate wage. That is, Title VII prohibits discrimination "with respect to * * * compensation,"

ibid., not with respect to "compensation *decisions*."[10] It would be passing strange, for example, to conclude that an employer had engaged in unlawful discrimination "with respect to * * * compensation" if he decided to pay a worker a lower wage because of her sex, but then accidentally paid her the same as everyone else. Although the employer's unexecuted decision may be worthy of contempt, Title VII did not establish a "general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Rather, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis added). Indeed, it is clear that one of the principal harms Congress intended Title VII to address was the economic harm – and the resulting social effects – from discrimination in pay. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) (noting that the legislative history of the 1972 Amendments to Title VII expressed "an explicit concern with the 'earnings gap' presently existing between black and white employees in American society") (citing S. Rep. No. 92-415, at 6 (1971)).

Thus, while it is true that Congress hoped to encourage voluntary compliance and to avoid needless litigation, see *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 764

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[10] Even if the relevant "unlawful employment practice" were a pay "decision," rather than the payment of an unequal wage for a discriminatory reason, petitioner would still be entitled to prevail. First, every week's paycheck constitutes a decision by the employer to pay its employee a particular amount for the work she performed that pay period. A pay decision that carries forward a prior unlawful disparity is, itself, a violation of Title VII. See *Bazemore*, 478 U.S. at 397. Second, even if the only cognizable "decision" were the employer's periodic decision setting a worker's salary level, at least one such decision was made during the limitations period in this case. Pet. App. 19a. That decision also violated the employer's obligation to ensure that "discriminatory differences in salaries [are] eliminated." *Bazemore*, 478 U.S. at 397.

(1998), "the purpose of Title VII" nonetheless is to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); see also *Burlington N. & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405, 2417 (2006). "We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981).

The *Bazemore* rule is faithful to these purposes, precluding an employer from permanently freezing in place a discriminatory salary level and ensuring that so long as an individual is subject to continuing disparate pay because of her sex or race, the law affords continuing access to a remedy. To be sure, delay may affect the nature and extent of the remedy available,[11] but *Bazemore* ensures that, at a minimum,

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[11] Some courts have held that backpay is limited to the disparity in pay received during the limitations period. See Pet. App. 24a-25a n.18 (Eleventh Circuit stating, in dicta, that "the employee is limited to recovering for those paychecks received within the limitations period") (collecting cases). Others, including the district court below, have read Section 706(g)(1) to permit recovery of two years' backpay. See 42 U.S.C. 2000e-5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."); Pet. App. 41a; Brief of National Partnership for Women and Families et al. (NPWF Br.) § III(B) (collecting cases). Members of this Court have previously noted the tension between Section 706(g)(1) and Section 706(a). Compare *Morgan*, 536 U.S. at 119 ("Morgan correctly notes that the timeliness requirement does not dictate the amount of recoverable damages. * * * If Congress intended to limit liability for conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay.") with *id.* at 126 (O'Connor, J., concurring in part and dissenting in part). This Court need not, however, resolve that tension in this case. The court of appeals held that petitioner failed to prove a violation of

an employee will generally be able to obtain prospective injunctive relief to end the ongoing violation of her Title VII rights.

On the other hand, under the Eleventh Circuit rule, if the employee fails to complain about a pay raise decision within six months, she may never seek even prospective relief and must quit her job and find a new one in order to regain an enforceable right to equal pay for equal work. A survey of the cases illustrates that this risk is predictably very real. See cases cited in Section III(A), *infra*. For example, many of the post-*Bazemore* cases involve discrimination in the assignment of an employee's initial salary.[12] It is not surprising that few employees are willing to begin their first six months of employment by filing a charge of discrimination with the EEOC. New employees may be grateful just to have a job, are likely to have less support from their new co-workers, and may be especially vulnerable to retaliation. See NPWF Br. § II(A)(2). One might hope that an employee would nonetheless quickly challenge the unlawful conduct of her employer, but her understandable reluctance to do so should not condemn the employee to a career as a second-class employee, particularly when the employer is unable to show that the delay in filing the charge caused any prejudice.

The impediments to challenging employment decisions also can exist long after the initial hiring, particularly in cases such as this. Petitioner spent her career as one of only a very few women attempting to prove herself in a non-traditional setting. While the reluctance to rock the boat may be

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Title VII. Pet. App. 37a. The Question Presented challenges only that liability decision, and does not encompass any question relating to the appropriate remedy should the jury's verdict on liability be reinstated.

[12] See, *e.g.*, *Shea* v. *Rice*, 409 F.3d 448, 449-50 (CADC 2005); *Goodwin* v. *Gen.l Motors Corp.*, 275 F.3d 1005, 1008 (CA10 2002); *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446 (CA11 1993).

overcome in the face of serious and immediate violations, the slow accumulation of harm from attendant pay discrimination presents a special risk that the Eleventh Circuit's rule will lead to the forfeiture of important federal rights.

Moreover, some delay in bringing disparate pay claims can be expected due simply to the lack of information about the pay received by fellow employees and the justification for any disparities. Simply being denied a raise is no ground for filing an EEOC charge and it is not uncommon for employee pay levels to be kept confidential or for workers to be reluctant to share salary information with each other. See, *e.g.*, L. Bierman & R. Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004). In this case, for example, Area Manager Robertson testified that she had no access to information regarding what others were being paid. J.A. 56-57; see also J.A. 89 (Goodyear manager testifying that pay raise allocation tables were "confidential documents, documents that always should be locked up"). The problem is particularly acute when the disparity arises not because the plaintiff is denied a raise but because her male counterparts are given *larger* raises, or because a later-hired male is given a higher starting salary. See, *e.g.*, *EEOC* v. *Penton Indus. Publ'g Co.*, 851 F.2d 835, 835-36 (CA6 1988) (disparity arose when employer hired male to same position as two existing female employees with equal qualifications, but paid the male substantially more).

In such cases, the plaintiff will have little reason even to suspect discrimination. And even when an employee knows she is being paid less than others, she may presume, at least initially, that there is a nondiscriminatory explanation, particularly where, as in this case, the employer uses a purportedly neutral merit system for setting wages. See generally NPWF Br. § II(A). The disparity often arises not from an employer's express or obvious campaign to discriminate, but from subtle biases that affect the discretionary aspects of pay decisions, including evaluations

of worker performance and relative merit. Cf. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003) (noting Congress's recognition of "subtle [sex] discrimination [in employment] that may be difficult to detect on a case-by-case basis"). And as a result, the unlawful discrimination takes its toll at the margins with accumulating effects that become visible, and then suspicious, only with time. It is often only after further information is revealed, or the disparity persists or increases, that an employee will come to suspect illegal conduct. It is to be expected, therefore, that 180 or 300 days will often pass before an employee has any reasonable basis for challenging a pay raise decision.[13]

It is true that an employee may avoid some of these hazards by immediately filing an EEOC charge after each pay decision she has the slightest reason to believe may reflect illegal discrimination. Indeed, the Eleventh Circuit rule creates an incentive to do so, to the detriment of both employers and the EEOC. But that result is inconsistent with Congress's intent that resort to the EEOC process and litigation should be a last resort, not the first. Cf. *EEOC* v. *Assoc. Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (rejecting

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[13] This concern could be blunted to some extent by the application of a discovery rule, tolling the limitations period until the employee had notice of sufficient facts to give rise to a reasonable belief that the employment action was discriminatory. But this Court has not yet recognized *any* discovery rule under Title VII, much less one calibrated to the discovery of how much other workers are paid. See *Morgan*, 536 U.S. at 115 n.7 (noting, but not resolving, question "whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered"). Compare also *id.* at 123-24 (O'Connor, J., concurring in part and dissenting in part, joined only by Justice Breyer) (expressing view that "some version of the discovery rule applies to discrete-act claims") with *TRW Inc.* v. *Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring, joined by Justice Thomas) (calling the "injury-discovery rule * * * [a] bad wine of recent vintage"). See also NPWF Br. § 2(A)(3).

interpretation under which "a charging party would have to file suit in a hopeless case in order to discover that the case was hopeless"). Absent the Eleventh Circuit's rule, many workers would be willing to wait to see if further experience allays their suspicion or if future raises reduce the suspect disparity, ultimately avoiding many pay disputes. *Bazemore* thus provides a legal environment that permits employees to give their employers an initial benefit of the doubt.

Of course, Congress also intended to discourage employees from waiting too long to bring well-founded charges of discrimination to the attention of the EEOC and the courts. The rule of *Morgan* and *Bazemore* implements this purpose as well, adequately protecting employers' interest in avoiding stale claims. As already noted, defendants who are actually prejudiced by an unjustified delay may raise a laches defense. See *Morgan*, 536 U.S. at 121. The only difference between this defense and the one Goodyear seeks is that laches precludes the redress of ongoing discrimination only when preclusion is necessary to protect an employer from prejudice.

There is good reason to think that such prejudice is, in fact, rare in disparate pay cases. As a matter of both practice and legal obligation, employers generally document the basis of pay decisions and retain those records for years.[14] Indeed, courts routinely hear pay-related claims under other statutes

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[14] The regulations promulgated under Title VII, for example, require employers to retain personnel records for one year, or until the final disposition of a charge of discrimination to which the records are relevant. See 29 C.F.R. 1602.14. The Equal Pay Act regulations require the retention of wage rate information for two years, while the Fair Labor Standards Act requires employers to keep payroll records for three years. See *id.* § 1620.32(c) (Equal Pay Act); *id.* § 516.5(a) (FLSA). See also *id.* § 1627.3(a) (ADEA requires retention of basic wage records for three years); *id.* § 1627.3(b)(2) (written description of merit system must be kept on file while system is in place, and for one year after its termination).

with two- or three-year limitations periods, with no indication that such delay unfairly prejudices defendants.[15] Moreover, employees have substantial incentives to avoid unwarranted delay. In addition to the risk of evoking a laches defense, delay may make it more difficult for the plaintiff to sustain her burden of persuasion, including the burden of rebutting an employer's proffered non-discriminatory explanation for a pay disparity. See, *e.g.*, *Reeves*, 530 U.S. at 143. And after a certain point, every day of delay costs the plaintiff a day's worth of potential backpay. See *supra* at 24 & n.11. Thus, as a practical matter, workers have little to gain, and much to lose, through undue delay. At the same time, permitting a plaintiff to challenge continuing pay discrimination when the defendant cannot show prejudice from delay furthers the fundamental purposes of Title VII.

III. The Rule Of *Morgan* And *Bazemore* Is Consistent With A Wide Array Of Long-Standing Authority.

A. Courts Of Appeals Have Applied *Bazemore* To Disparate Pay Cases For More Than Two Decades.

Both before and after *Morgan*, the vast majority of the courts of appeals – including, until this case, the Eleventh Circuit – have understood *Bazemore* to establish that a plaintiff may raise a disparate pay claim to challenge each discriminatory paycheck received during the limitations period.[16] Indeed, the rule of *Bazemore* was well-established

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[15] Minimum wage and overtime claims under the FLSA, as well as Equal Pay Act claims, are subject to a two-year statute of limitations, extended to three years for willful violations. See 29 U.S.C. 206(d)(3), 255. A worker charging racial discrimination in employment may file a claim under 42 U.S.C 1981 up to four or more years after the violation has occurred. See 28 U.S.C. 1658; *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

[16] See *Wedow* v. *City of Kansas City*, 442 F.3d 661, 671 (CA8 2006) (interpreting *Bazemore* as establishing that "each week's

paycheck that delivers less on a discriminatory basis is a separate Title VII violation"); *Forsyth* v. *Federation Employment & Guidance Serv.*, 409 F.3d 565, 573 (CA2 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea* v. *Rice*, 409 F.3d 448, 452 (CADC 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason.") (citing *Bazemore*); *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1009 (CA10 2002) ("But [*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination – instead it is itself a continually recurring violation."); *Anderson* v. *Zubieta*, 180 F.3d 329, 335 (CADC 1999) ("The plaintiffs respond that their complaints allege continuing violations of Title VII, actionable upon receipt of each paycheck. We agree. * * * The Courts of Appeals have repeatedly reached the same conclusion.") (citing *Bazemore* and collecting court of appeals cases); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (CA8 1995) (en banc) ("Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge.") (citing *Bazemore*); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 349 (CA4 1994) ("[P]aychecks are to be considered continuing violations of the law when they evidence discriminatory wages."); *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (CA11 1993) ("Contrary to Partners' assertions, Calloway's wage claim is not a single violation with a continuing effect. * * * When the claim is one for discriminatory wages, the violation exists every single day the employee works."); *Beavers* v. *American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (CA11 1992) ("[T]he Supreme Court clearly recognizes the distinction this court has drawn between the present effects of a one-time violation—as in *Ricks*—and the continuation of the violation into the present—as in *Bazemore*."); *EEOC* v. *Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (CA6 1988) ("The Supreme Court has recognized the existence of a 'continuing violation'" in *Bazemore*, where "there was a *current* and *continuing* differential between the wages earned by black workers and those earned by white workers.") (emphasis in original); see also

in the circuits even before this Court's decision in that case.[17] In statutory interpretation, stability is a virtue and novelty a vice, especially "in an area that has seen careful, intense, and sustained congressional attention." *Square D. Co.* v.

Zuurbier v. *Medstar Health, Inc.*, 895 A.2d 905, 913 n.13 (D.C. 2006) ("[A]n employee may recover for discriminatorily low pay received within the limitations period because each paycheck constitutes a discrete discriminatory act.")

[17] See, *e.g.*, *Gibbs* v. *Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (CA9 1986) ("The policy of paying lower wages * * * on each payday constitutes a 'continuing violation.'"); *Berry* v. *Bd. of Supv. of LSU*, 715 F.2d 971, 980 (CA5 1983) ("We also observe that there are a number of decisions in which salary discrimination has been found to constitute a continuing violation of Title VII, usually on the rationale that each discriminatory paycheck violates the Act."); *Bartelt* v. *Berlitz Sch. of Languages of Am.*, 698 F.2d 1003, 1004-05 & n.1 (CA9 1983) (rejecting argument that disparate pay claim accrued upon making of pay decision); *Lamphere* v. *Brown Univ.*, 685 F.2d 743, 747 (CA1 1982) ("[A] decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights."); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (CA6 1982) ("[T]he discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received."); *Jenkins* v. *Home Ins. Co.*, 635 F.2d 310, 312 (CA4 1980) ("Unlike *Evans*, the Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period; an amount less than was paid her male counterparts for the same work covering the same period."); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743 (CA8 1980) ("The practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues."); *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041, 1051 (CA5 1973) ("Sex-based, discriminatory wage payments constitute a continuing violation of the Equal Pay Act.").

Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986). See Part IV, *infra*.

B. The EEOC Has Consistently Interpreted Title VII To Permit Challenges To Disparate Pay Received During The Limitations Period.

Like the courts of appeals, the EEOC has consistently interpreted Title VII to permit an employee to file a disparate pay charge within 180 or 300 days of the receipt of a discriminatory paycheck. The EEOC's Compliance Manual provides that "[a] discrete act, such as failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge." EEOC COMPLIANCE MANUAL § 2-IV.C. Citing *Bazemore*, the Manual goes on to explain that "[r]epeated occurrences of the same discriminatory employment action, *such as discriminatory paychecks*, can be challenged as long as one discriminatory act occurred within the charge filing period." *Ibid.* (emphasis added, footnote omitted). See also *id.* § 10-IV n.39 (same for Equal Pay Act); EEOC COMPLIANCE MANUAL § 2-IV.C (July 27, 2000) (prior version of Manual, stating that each discriminatory paycheck constitutes "a wrong actionable under Title VII"). The agency also repeated this position as *amicus* in this case, supporting the petition for rehearing. See EEOC *Amicus* Br. 9.

The Commission has given effect to that interpretation in a series of administrative decisions under the provisions of the Act extending Title VII's protections to federal employees. See 42 U.S.C. 2000e-16(a); 29 C.F.R. pt. 1614. In one case, for example, an ALJ dismissed a federal employee's disparate pay claim as untimely because the disparity arose, and the employee became aware of the disparity, outside the limitations period. The Commission disagreed, explaining that

> [e]ach paycheck that complainant receives which is less than that of similarly situated employees outside of her protected classes could support a claim under

> Title VII if discrimination is found to be the reason for the pay discrepancy. See *Bazemore* v. *Friday*, 478 U.S. 385, 396 (1986) (Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII). The Commission in essence determines that complainant's claim of unequal wages is a recurring violation, meaning that complainant was aggrieved each time she received a paycheck that purportedly provided her with wages unequal to those received by male employees doing substantially the same work. See, e.g., *Englund v. EEOC*, Appeal No. 01A10826 (July 13, 2001).

Albritton v. *Postmaster General*, No. 01A44063, 2004 WL 2983682, at *2 (EEOC Office of Fed. Op., Dec. 17, 2004).[18]

Any ambiguity in the statute should be resolved through deference to the Commission's reasonable administrative interpretation of the Act. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229-30 & n.12 (2001); *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988).

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[18] See also, *e.g.*, *Bynum-Doles* v. *Winter*, No. 01A53973, 2006 WL 2096290, at *5 (EEOC Office of Fed. Op., July 18, 2006); *Amft* v. *Mineta*, No. 07A40116, 2006 WL 985183, at *5 (EEOC Office of Fed. Op., Apr. 6, 2006); *Ward* v. *Potter*, No. 01A60047, 2006 WL 721992, at *1 (EEOC Office of Fed. Op., Mar. 10, 2006); *McCrae* v. *Gutierrez*, No. 01A53762, 2005 WL 2254365, at *1 (EEOC Office of Fed. Op., Sept. 9, 2005); *Sherlock* v. *England*, No. 01A13830, 2002 WL 31232256, at *3 (EEOC Office of Fed. Op., Sept. 25, 2002).

C. Treating Each Paycheck As A Discrete Event Under Title VII Is Consistent With The Law's Treatment Of Claims Related To Periodic Payments In Analogous Contexts.

The principles applied by the courts of appeals and the EEOC have also been applied in analogous contexts for decades.

Equal Pay Act. *Bazemore* was presaged by this Court's Equal Pay Act decision in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). In the 1940s, Corning Glass Works employed men as night-shift plant inspectors and women for the day shift, paying its male employees both a shift-differential to account for the less desirable shift and a higher base salary because of their sex. In 1966, Corning began to allow women to apply to work on the night shift, and in 1969 a new collective bargaining agreement required that the difference in base pay between day and night inspectors be eliminated for all new hires. However, the disparity in base pay continued for those previously hired, and most female inspectors continued to have lower base salaries than men performing the equivalent job. *Id.* at 192-94.

When the Secretary of Labor eventually brought suit – decades after the relevant discriminatory pay decision had been made – this Court had no difficulty in concluding that the continued enforcement of the policy resulted in a present violation of the Act. "That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." *Id.* at 205. The only question was whether subsequent revisions to the policy had cured the violation. *Id.* at 205-06. In answering that question, the Court explained that it was not enough that new hires were given equal wages because the employer "continued to provide unequal base wages for employees hired before that date, a discrimination

likely to continue for some time into the future * * * ." *Id.* at 208.

Consistent with this holding, the lower courts routinely hear Equal Pay Act claims challenging pay disparities that first arose outside the limitations period. See, *e.g.*, *Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115, 119 (CA2 1997); *Ashley*, 66 F.3d at 168; *Brinkley-Obu*, 36 F.3d at 347; *Gandy* v. *Sullivan County, Tenn.*, 24 F.3d 861, 864 (CA6 1994); *Miller* v. *Beneficial Mgmt. Corp.*, 977 F.2d 834, 843-44 (CA3 1992); *Nealon* v. *Stone*, 958 F.2d 584, 591 (CA4 1992).

Fair Labor Standards Act. It is equally well established that the statute of limitations for violations of the minimum wage and overtime provisions of the Fair Labor Standards Act runs anew with each paycheck. See, *e.g.*, *Knight* v. *Columbus, Ga.* 19 F.3d 579, 581 (CA11 1994) ("Each failure to pay overtime constitutes a *new* violation of the FLSA.") (emphasis in original); *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041, 1050 (CA5 1973) ("It is well settled that [a] separate cause of action for overtime compensation accrues at each regular payday immediately following the work period during which the services were rendered and for which the overtime compensation is claimed.") (internal quotation marks omitted); *Halferty* v. *Pulse Drug Co.*, 821 F.2d 261, 271 (CA5 1987) ("A cause of action accrues at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed."); *Beebe* v. *United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (holding that "a separate cause of action accrued each payday when the [defendant] excluded the overtime compensation [the plaintiffs] claim in this suit").

Wage Disputes Generally. Indeed, wage disputes generally have long been treated as giving rise to recurring claims with independent limitations periods. See, *e.g.*, 31 WILLISTON ON CONTRACTS § 79:17 (4th ed. 1990) ("Where compensation for services rendered is payable in installments, the statute of limitations begins to run on each installment

when it becomes due and payable."); H.G. Wood, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 663 (1916) (same). See also *Burich* v. *United States*, 366 F.2d 984, 986 (Ct. Cl. 1966) (in case under Federal Employee Pay Act of 1945, 5 U.S.C. 911, observing that "[t]his court has long adhered to the view that a suit for compensation due and payable periodically is, by its very nature, a 'continuing claim' which involves multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due") (collecting cases).

Other Installment Obligations. The rule applied in *Bazemore* is also applied to periodic payment obligations of other types. This Court applied the rule, for example, in *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of California*, 522 U.S. 192 (1997), where pension fund trustees sued an employer to recover payments due under the Multiemployer Pension Plan Amendments, 29 U.S.C. 1381(a). Applying the "standard rule for installment obligations," this Court held that "a new cause of action, carrying its own limitations period, arises from the date each payment is missed." *Id.* at 208 (citation and internal quotation marks omitted). See also *id.* at 208-09 & n.6 (collecting cases applying same rule to "installment judgments," such as court-ordered child support and alimony). This Court acknowledged that, as a result of this rule, a plaintiff could wait nearly twenty years – the length of the installment plan – before bringing suit. *Id.* at 210. But it nonetheless concluded that a "pension fund's action to collect unpaid withdrawal liability is timely as to any payments that came due during the" limitations period. *Ibid.*

National Labor Relations Act. The same basic rule has been applied under the National Labor Relations Act (NLRA), 29 U.S.C. 160, which served a model for many of Title VII's enforcement provisions. See, *e.g.*, *Lorance* v. *AT&T Tech., Inc.*, 490 U.S. 900, 909 (1989).

In *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), for example, the National Labor Relations Board held that "each failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of Respondents' bargaining obligation and, therefore, that any benefit fund payment due [within the limitations period] is subject to the Board's remedial powers." Similarly, in *GMAC* v. *NLRB*, 476 F.2d 850, 852 (CA1 1973), an employer decided to stop giving merit raises after its employees began to unionize. The court rejected the employer's assertion that "the Board was barred by [the NLRB limitations provision] from finding that [its] conduct was unlawful because the original decision to stop paying these raises was made more than six months before the complaint in this action was filed." *Id.* at 853.

Similarly, in *Melville Confections, Inc.* v. *NLRB*, 327 F.2d 689 (CA7 1964), an employer excluded unionized employees from participation in the company profit-sharing plan. Although the decision to discriminate against the union was made more than four years before a charge was filed with the NLRB, the court held that the charge was timely because the discrimination was continuously implemented during the limitations period. *Id.* at 692. See also, *e.g.*, *NLRB* v. *F.H. McGraw & Co.*, 206 F.2d 635, 639 (CA6 1953) (refusal to hire non-union employees constituted present violation of the Act even though action simply implemented a contract executed outside the limitations period).

Antitrust. Finally, if Goodyear had charged an illegal price for its tires, rather than paid an illegal wage for its labor, there would be no question that its customers would be able to sue for each sale that occurred during the limitations period, even if the illegal price-setting decision took place outside the limitations period. "Antitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the

plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (quoting 2 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 338b, at 145 (rev. ed. 1995) (footnote omitted)).

IV. Congress Enacted And Amended Title VII Against The Backdrop Of The Legal Principles Applied In *Bazemore*.

Accordingly, Congress enacted, and later amended, Title VII against a legal backdrop in which claims relating to periodic payment such as wages were considered to arise with each challenged payment. By the time Congress amended Title VII in 1972 and again in 1991, that understanding had been applied by the lower courts and then this Court to disparate pay claims. "This background law not only persuades by its regularity over time but points to tacit congressional approval" of the general rule, "Congress being presumed to have known of this settled judicial treatment * * * when it enacted and later amended Title VII." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 116-17 (2002). In all cases, "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Burlington Industries*, 524 U.S. at 764 (citation omitted). But that rule applies with special force when, as here, "Congress has not altered" one of this Court's cases, "even though it has made significant amendments to Title VII in the interim." *Id.* at 764-65.

Indeed, in 1991 Congress plainly ratified *Bazemore* and its progeny in the lower courts when it amended Title VII's time limits to overrule *Lorance* v. *AT&T Tech., Inc.*, 490 U.S. 900 (1989),[19] but left *Bazemore* intact. The Senate Report for

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[19] Pointing to the "'special treatment' accorded to seniority systems under Section 703(h)," *Lorance* held that certain challenges to seniority systems – *i.e.*, those alleging that a system

the initial version of the bill explicitly explained that the revision

> does not alter existing law regarding when an employer's discrete action is, and is not, a continuing violation of the law * * *. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), for example, the salaries of minority workers had, for racial reasons, been set at a lower level than those of comparable white workers; the Supreme Court properly held that each application of that racially motivated salary structure, *i.e.*, each new pay check, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*.

Civil Rights Act of 1990 – Report from the Senate Labor and Human Resources Committee, S. Rep. No. 101-315, at 54 (1990). Although the bill underwent further changes, Congress's intent to retain existing limitations jurisprudence, while overturning *Lorance*, remained the same. Thus, the interpretive memorandum of the sponsors of the final legislation explained that the revision to overrule *Lorance* was necessary, in part, because "[u]nfortunately, some lower courts have begun to apply the '*Lorance* rationale' outside the context of seniority systems." 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991). The sponsors then explained that the "legislation should be interpreted as disapproving the extension of this decision rule to contexts outside of seniority systems," but that it "should not be interpreted to affect the sound ruling of the Supreme Court regarding 'continuing violations.'" *Ibid.*[20]

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neutral on its face and in application was enacted for a discriminatory purposes – accrue at the time of the adoption on the system, not its application. 490 U.S. at 911-12.

[20] See also, *e.g.*, H.R. Rep. No. 102-40, at 23-24 & n.39 (1991) (House version of what would become Civil Rights Act of 1991) ("What Subsection 7(a)(2) does not do is affect existing law

The inference of congressional approval of *Bazemore* is all the more powerful in light of the fact that the 1991 amendments were explicitly enacted in order to revise not only *Lorance* but *seven* other of this Court's decisions with which Congress disagreed, including *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), decided the same day as *Bazemore*. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 250-51 (1994).

V. There Is No Basis For An Extra-Textual Limitation On "How Far Back" A Plaintiff May Reach For Evidence To Prove Liability On An Otherwise Timely Claim.

In the face of *Bazemore* and the overwhelming precedent applying it to disparate pay cases, the Eleventh Circuit seemed to recognize that challenges to paychecks received during the limitations period might be timely under Section 706(e)(1). Pet. App. 22a. But the court asserted there is a separate question "how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim." Pet. App. 22a-23a. The court seemingly acknowledged that this limitation would not derive from Title VII's limitations provision, or any other portion of the text of the statute. But the court nonetheless insisted that "[t]here must, however, be some limit on how far back the plaintiff can reach." Pet. App. 23a. Implementing that intuition, the court created an extra-textual limitation of its own, supplementing the express limitations provision of Title VII with the requirement that "at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision

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with respect to the 'continuing violation' theory.") (citing *Bazemore* as example in footnote).

directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a. This rule – never before applied by any court during the forty years of Title VII's existence – is plainly inconsistent with the decisions of this Court, the legal background against which the statute was enacted and amended, and the general purposes of the Act.

A. The Eleventh Circuit's Rule Would Have Required The Opposite Result In *Bazemore* Itself.

To start, the Eleventh Circuit's rule is flatly inconsistent with the holding, rationale, and result of *Bazemore* itself. The Extension Service, like Goodyear, had in place a system of periodic salary review under which employees were ranked in order of performance and given merit raises above their existing base salaries. See *Bazemore*, 478 U.S. at 394-96 & n.7; *Bazemore*, 751 F.2d at 666-67 (describing Extension Service's system of annual performance evaluations and merit pay raise decisions). That assertedly non-discriminatory ranking system had been in place for a number of years and, in fact, had reduced somewhat the disparity that had carried over from the years before the effective date of Title VII. 478 U.S. at 394-95. Under the Eleventh Circuit's rule, the *Bazemore* plaintiffs would have been required to show that the present disparity in their pay was the result of the most recent raise decisions and would have been precluded from relying on the prior, pre-Act discrimination. And that, in fact, is what the court of appeals in *Bazemore* held and why it "considered solely whether the Extension Service discriminated with respect to the application of quartile rankings" that governed recent pay decisions. *Id.* at 397. This Court, however, held precisely the opposite: "Because, as we have explained, the Extension Service was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII, the Court of Appeals erred in concentrating its analysis solely on the issue whether there was racial discrimination in the ranking

system." *Ibid.* Thus, this Court specifically held that the plaintiffs could recover for the portion of the current disparity attributable to pay decisions made as long as *six years* before the Act was even applicable to the defendant. See *id.* at 395 (disparity arose prior to integration of branches in 1965).

The court of appeals' newly minted rule also conflicts with the basic rationale of *Bazemore*. This Court plainly understood that Title VII imposes no arbitrary limit on "how far back in time," Pet. App. 22a, relevant evidence of intentional discrimination may extend. Instead, Title VII imposes on an employer the "obligation to eradicate salary disparities based on race" or sex even if the disparity arose outside the limitations period (or even before the effective date of the statute). 478 U.S. at 397. The Court's holding thus can be characterized in two ways, both of which are inconsistent with the decision below. On the one hand, *Bazemore* can be read to establish that a plaintiff may prove a violation of Title VII by showing that disparate pay received during the limitations period is the result of intentional discrimination, even if the discriminatory decisions were made outside the limitations period (or effective date of the Act). Alternately, *Bazemore* can be read as recognizing that an employer has a continuing obligation to avoid perpetuation of prior discriminatory pay decisions into the present, a duty that is violated anew with each unremedied disparate paycheck. However construed, the case precludes the court of appeals' holding that petitioner was required to prove an intentionally discriminatory pay raise decision in, or immediately before, the limitations period.

B. The Eleventh Circuit's Rule Is Inconsistent With Established Rules Governing Limitations On Actions And Evidence.

The rule invented by the court of appeals furthermore is inconsistent with the law's settled treatment of limitations on actions and the evidence to prove them.

1. Limitations on "how far back a plaintiff may reach" to prove a violation of her rights are imposed by statutes of limitations and the doctrine of laches, not ad hoc judge-made rules. Indeed, the court of appeals was unable to cite any authority for its conclusion that there must be an additional timeliness restriction beyond a statutory limitations period and laches, although the issue necessarily arises under innumerable statutory regimes. It is not unusual for the elements of a claim to arise at different times. See Corman, LIMITATION OF ACTIONS § 6.1 (1991). For example, in the case of a price-fixing conspiracy, the conspiratorial agreement may be formed years before the defendant charges a particular plaintiff the illegal price. Cf., *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 333 (1971). But the cause of action accrues with the illegal charge, which starts the running of the statute of limitations, [21] and nothing in the law limits "how far back" the plaintiff may reach to establish the conspiratorial agreement that is the "central, requisite element of every successful" antitrust conspiracy claim. Pet. App. 23a-24a. See *Klehr*, 521 U.S. at 189.

"A statute of limitations does not operate to bar the introduction of evidence that predates the commencement of the limitations period but that is relevant to events during the period." *Fitzgerald* v. *Henderson*, 251 F.3d 345, 365 (CA2

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[21] This Court has "repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham County Soil & Water Conserv. Dist.* v. *United States*, 125 S. Ct. 2444, 2450 (2005). "Unless Congress has told us otherwise * * *, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff and file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. Thus, a claim accrues with the establishment of the *last* (not the *first*) element of a plaintiff's cause of action. In a disparate pay case, like many other claims, the last element is the injury to the plaintiff (*i.e.*, the payment of a disparate wage).

2001) (collecting cases); 51 Am. Jur. 2d LIMITATION OF ACTIONS § 24 (2006). Rather, any "suggestion that an item of evidence relates to a period that is too remote goes to both the item's relevance and its weight," *Fitzgerald*, 251 F.3d at 365, not to whether the plaintiff is absolutely precluded from establishing her claim. Thus, in *Morgan*, this Court held that Title VII's limitation provision does not "bar an employee from using the prior acts as background evidence in support of a timely claim." 536 U.S. at 113. Indeed, it is commonplace for a plaintiff to rely on evidence outside the limitations period to establish that an act occurring within the limitations period was unlawful. For example, in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court considered a discriminatory termination case under Title VII. In response to the plaintiff's *prima facie* case, the employer asserted that the plaintiff had been terminated because of poor performance. The plaintiff countered with further direct evidence of discriminatory animus and other proof of pretext based on events taking place years before the challenged termination. See *id.* at 151-53.

It makes no difference that the events outside the limitations period are used to establish a critical element of the violation. In *United States* v. *Carlson*, 235 F.3d 466 (CA9 2000), a defendant argued that the government was precluded from relying on acts outside the limitations period to establish the "evasion" element of a tax evasion claim. The court disagreed, explaining that "the statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally a tax deficiency." *Id.* at 470. That the evasion element was established earlier, and outside the limitations period, did not preclude the government from proving that element of the offense. *Ibid.* "It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an essential element, such as intent, could only be established by proof of incidents occurring outside

the period." *United States* v. *Ashdown*, 509 F.2d 793, 798 (CA5 1975).

The rule is no different in a civil case or when the element is discriminatory animus. In *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985), for example, this Court struck down a provision of the Alabama Constitution of 1901 because it was "motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." The fact that the discriminatory intent element was established more than eighty years before the plaintiff suffered the injury that completed the cause of action was of no import. The implementation of a prior discriminatory decision within the limitations period was sufficient.

Indeed, as Judge Easterbrook noted in *Palmer* v. *Board of Education*, 46 F.3d 682 (CA7 1995), a contrary rule would have rendered untimely the suits that produced *Brown* v. *Board of Education*, 347 U.S. 483 (1954), as the discriminatory treatment in those cases was plainly based on policies established well outside the limitations period. Accordingly, in *Palmer*, the court rejected the claim that students' objections to race-based school assignments were untimely because they were not raised within two years (the applicable limitations period) of the creation of the assignment system. "We believe – as the Court assumed in *Brown* – that a claim of racial discrimination arises each day a child is assigned to school under a racially discriminatory policy." 46 F.3d at 683. As the court in *Palmer* recognized, this same principle applies to discrimination in pay: "A public employer that applies different salary schedules to black and white employees commits a new wrong every pay period, and the fact that the employer has been violating the Constitution for a generation does not permit it to commit fresh violations." *Id.* at 686 (citing *Bazemore*).

This Court has based any number of decisions on the same assumption it entertained in *Brown*, permitting civil

rights plaintiffs to challenge present disparate treatment arising from discriminatory decisions made outside the limitations period. For example, in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), this Court considered whether an employer was violating Title VII through a long-standing practice of requiring female workers to make larger pension contribution than male workers. As a result of this policy, "a female employee took home less pay than a male employee earning the same salary." *Id.* at 705. This Court did not find the claim untimely but instead held that the practice violated Title VII and went on to consider the appropriate remedy. *Id.* at 717-18. See also *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073 (1983).

2. The court of appeals' limitation of its new rule to cases involving "a system for periodically reviewing and re-establishing employee pay," Pet. App. 24a, does not make the rule any more defensible.

As an initial matter, it is important to be clear about what the Eleventh Circuit held. The court could not have intended its reference to "re-establishing employee pay" to mean a system in which the worker's salary is subject to *de novo* review, as distinguished from a system in which the employee is evaluated for a possible marginal increase to her present salary. First, there is no need for a special rule for employers who conduct *de novo* reviews. When an employer conducts a truly *de novo* re-establishment of a worker's pay, that review constitutes the only cause of the present disparity and, accordingly, the employee must establish that the *de novo* decision was discriminatory. This requirement arises not from Section 706(e)(1)'s time limitation, but rather from the substantive elements of a Title VII violation. Second, the Eleventh Circuit could not have intended to create a rule restricted to cases involving truly *de novo* re-establishment of pay because that rule would have no application to this case. The court's opinion and the record below are clear that Goodyear's annual review process was limited to determining

whether the employee should be given a marginal raise based on the prior year's performance.[22]

As noted above, even subject to this limitation, the rule adopted by the Eleventh Circuit would have required the opposite result in *Bazemore* itself, for the employer in that case also had in place a system of periodic pay reviews. See Section V(A), *supra*. That this system provided an "opportunity for an employee to make any pay-related complaints" at "the point at which the employee's salary is reviewed," Pet. App. 24a, was immaterial to this Court's decision in *Bazemore* and remains irrelevant here.

There is no basis for the court of appeals' distinction in the text of Title VII itself. Section 706(e) requires a charge within 180 days of the "unlawful employment practice" in every case, whether the employer conducts periodic pay reviews or not. 42 U.S.C. 2000e-5(e)(1). And there is no reason to conclude that the definition of an "unlawful employment practice" changes depending on how an employer organizes its pay decisionmaking process.

Nor is there any sound policy basis for the distinction the Eleventh Circuit drew. As the court acknowledged in attempting to distinguish prior circuit precedent, its rule is not well suited to ferreting out claims that are likely to be stale. Where, as in *Calloway*, an employer has no system for periodic review, the Eleventh Circuit would permit claims based on the setting of a worker's initial wage years outside the limitations period. Pet. App. 26a-27a.

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[22] See, *e.g.*, Pet. App. 4a (describing how, "in the early months of each year, each [manager] was charged with recommending salary increases for the salaried employees under his or her supervision"); *id.* 4a-5a (annual evaluation included employee's "performance ranking, present salary, and salary range; the date of his or her last increase; the *recommended increase for the coming year (in dollars and as a percentage increase over present salary)*; and the date that the increase would become effective") (emphasis added). See also, *e.g.*, J.A. 69-70.

Nor is the distinction justified on the ground that employers like Goodyear give "the plaintiff regular opportunities to complain of improperly deflated pay and to seek a raise," Pet. App. 26a. Even in the absence of annual pay reviews, employees have ample "opportunity * * * to make any pay-related complaints." *Id.* 24a. Indeed, this Court has encouraged employers to develop grievance systems specifically to ensure that workers will continually have access to a means of raising such complaints. See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 805-08 (1998). The Court has not, however, altered the charge filing deadlines when such systems are available or put to use. See *Int'l Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236-41 (1976) (limitations period not tolled during pendency of grievance or arbitration proceedings).

In any case, the court of appeals' suggestion that a periodic pay review system creates a special opportunity for correcting past discrimination is misleading. In this case, for example, Goodyear's managers testified that they were precluded from considering whether the current salary level was inappropriate and were limited to asking only whether the prior year's performance warranted a raise. See, *e.g.*, J.A. 69-70, 86-87, 94-95. Moreover, even if they had taken prior discrimination into account, the caps Goodyear imposed on raises precluded managers from providing petitioner with an adequate remedy.[23]

The Eleventh Circuit's rule would also be difficult to implement in practice, requiring workers, the EEOC and the courts to answer a variety of difficult questions – *e.g.*, whether the company reviews pay with sufficient frequency to invoke the rule; whether the employee is truly able to

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[23] See J.A. 131, 133 (maximum raise allowed was five percent Individual Performance Award, plus five percent Top Performance Award); J.A. 87-88 (supervisor given $906 for raises to spread among six Area Managers).

complain about prior pay discrimination as grounds for seeking a raise; whether limitations on the frequency or amount of possible raises disqualifies the system, etc. – in order to decide the threshold question of timeliness. Such uncertainty is anathema to any limitations rule and is particularly inappropriate under Title VII, which was intended to create "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Commercial Office Prods.*, 486 U.S. at 124.

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To the extent there is a limit on "how far back a plaintiff may reach" to prove the discriminatory intent responsible for a current disparity in wages, that limit derives from the established doctrine of laches, not the unprecedented rule created by the Eleventh Circuit in this case. Laches directly addresses the concerns animating the lower court's decision – the need "to encourage prompt resolution of employment disputes" and to avoid stale claims, Pet. App. 23a – but with the balanced and flexible approach inherent in equity and importantly absent from the rule applied below. Having failed to invoke that traditional defense at trial, Goodyear was not entitled to escape liability by convincing the court of appeals that its most recent decisions simply perpetuated, rather than exacerbated, its prior discriminatory pay raise decisions. And because there was ample evidence supporting the jury's finding that that petitioner was paid less than her male colleagues for equal work because of her sex during the limitations period, the liability verdict should be reinstated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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